Supreme Court, U.S.
FILED

No. _____ 96 33 JUL 3 1996

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

HILLEL CHODOS

Petitioner,

v.

SHOP TELEVISION NETWORK, INC.

Respondent.

On Petition For Writ Of Certiorari
To The Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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65 pp

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CONTENTS REPRODUCED FROM FURNISHED PRETYPED COPY.

QUESTION PRESENTED

May a bankruptcy court retain jurisdiction over a state law dispute and continue to hold property under a turnover order after the debtor has returned to solvency and paid all its creditors and all expenses of bankruptcy jurisdiction in full, and the court has consequently dismissed the bankruptcy proceeding?

PARTIES TO THE PROCEEDING

Hillel Chodos

Fierstein & Sturman Law Corporation

Shop Television Network, Inc.

TABLE OF CONTENTS

QUESTION PRESENTED 2

OPINION AND ORDER BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

REASONS FOR GRANTING THE WRIT 3

PROCEDURAL AND FACTUAL HISTORY 6

ISSUES RAISED BELOW (RULE 14(H)) 9

I. BANKRUPTCY JURISDICTION MUST TERMINATE WHEN THE REASONS FOR AFFORDING BANKRUPTCY PROTECTION CEASE TO EXIST. 10

II. GOOD CAUSE FOR RETAINING POST-DISMISSAL BANKRUPTCY JURISDICTION MUST REST ON CURRENT CONDITIONS WHICH COULD AFFECT THE ESTATE. 16

CONCLUSION 17

APPENDIX

AMENDED ORDER GRANTING MOTION OF DEBTOR FOR ORDER REQUIRING RETURN OF EXCESSIVE COMPENSATION (Bankruptcy Court) Entered 5/26/93 A1

ORDER AUTHORIZING VOLUNTARY DISMISSAL OF DEBTOR'S BANKRUPTCY CASE (Bankruptcy Court) Entered 9/29/93 A4

ORDER (U.S. District Court) Filed 1/25/94 A8

MEMORANDUM OF DECISION AND ORDER AFFIRMING BANKRUPTCY COURT TURNOVER ORDER (U.S. District Court) Entered 7/26/94 A11

MEMORANDUM (9th Circuit Court of Appeals) Filed 3/6/96 A24

ORDER DENYING REHEARING (9th Circuit Court of Appeals) A38

11 U.S.C. §329 A39

11 U.S.C. §349 A40

TABLE OF AUTHORITIES

CASES

Baltimore & Ohio R.R. Co. v. Baugh, 149 U.S. 368 (1892) 12

Celotex Corp. v. Edwards, ____ U.S. ____, 115 S.Ct. 1493 (1995) 8, 10, 14

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 11, 12

Northern Pipeline Const. v. Marathon Pipe Line Co. 458 U.S. 50 (1982) 11, 15

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 12

Younger v. Harris, 401 U.S. 37 (1971) 12, 16

CONSTITUTION, STATUTES & RULES

United States Constitution
Article I, Section 8 2
Tenth Amendment 11

11 U.S.C.
§ 105 4
§ 106 4
§ 328 4
§ 329 3, 4, 7, 9, 12
§ 349 3, 8, 16
§ 362 4
§ 544 4
§ 545 4
§ 547 4
§ 548 4
§ 549 4

28 U.S.C.
§1254 2
§1257 2
§1334 3

U.S. Supreme Court Rules
Rule 13 2
Rule 14(h) 9

No. _____

In The

Supreme Court of the United States

October Term, 1996

HILLEL CHODOS

Petitioner,

v.

SHOP TELEVISION NETWORK, INC.

Respondent.

Petition For Writ Of Certiorari
To The Ninth Circuit Court of Appeals

Petitioner Hillel Chodos respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Ninth Circuit Court of Appeals entered in the above-entitled proceeding on March 6, 1996.

QUESTION PRESENTED

May a bankruptcy court retain jurisdiction over a state law dispute and continue to hold property under a turnover order after the debtor has returned to solvency and paid all its creditors and all expenses of bankruptcy administration in full, and the court has consequently dismissed the bankruptcy proceeding?

OPINION AND ORDER BELOW

The unpublished memorandum opinion of the Ninth Circuit Court of Appeals is reprinted at pages A24-A37 of the Appendix. Its unofficial citation is 1996 U.S. LEXIS 6520. The order denying petitioner's petition for rehearing is at pages A38 of the Appendix.

JURISDICTION

The opinion of the Ninth Circuit was filed March 6, 1996. Petitioner filed a timely petition for rehearing on March 20, which the court denied on April 8. Accordingly, this petition is timely under Rule 13 of the United States Supreme Court Rules.

This Court's jurisdiction to grant certiorari is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article I, Section 8, Clause 4 provides:

"The Congress shall have Power . . . To establish . . .

uniform Laws on the subject of Bankruptcies throughout the United States . . . "

28 U.S.C. §1334(b) provides:

> "Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."

Other statutes and rules relevant to this petition are 11 U.S.C. §§ 329, and 349. These provisions are set forth at pages A39-A40 of the Appendix.

REASONS FOR GRANTING THE WRIT

Bankruptcy is no longer an arcane corner of the law. Consumer and business bankruptcy filings have proliferated. According to the American Bankruptcy Institute, the Administrative Office of the Courts reports that bankruptcy filings for the first quarter of 1996 reached the highest total for a three-month period in history.

The act of filing a bankruptcy petition is now viewed as an asset management technique rather than a blot on one's financial escutcheon. Bankruptcy courts are therefore forcing themselves to an unprecedented degree into garden variety tort and contract disputes previously relegated to state courts.

This pervasive federal intervention into areas formerly within the exclusive province of state courts is carried out under the Bankruptcy Code. That Code establishes procedures which turn traditional legal expectations and equitable concepts inside out. The Bankruptcy Code empowers bankruptcy courts to override ordinary legal practices and priorities by such means as the power to avoid and set aside otherwise legal transactions in order to equalize the treatment of all creditors of the debtor (e.g., 11 U.S.C. §§ 544, 545, 547, 548, 549), the power to regulate and re-arrange the compensation of professionals, and particularly lawyers representing the debtor in the bankruptcy case (e.g., 11 U.S.C. §§ 328 and 329), the automatic stay of all creditor actions and enforcement proceedings against the debtor upon the filing of a bankruptcy petition (11 U.S.C. §362), and the power to make such other orders as may be necessary to accomplish the purposes of the Bankruptcy Code (e.g., §§ 105 and 106). While these extraordinary powers are sometimes needed to accomplish the purposes of bankruptcy law, when the necessity has ended, so too must the intrusiveness of the bankruptcy courts. This is especially true since bankruptcy judges are not Article III judges.

To ensure an end to intrusion, there must be clear boundaries to the jurisdiction of bankruptcy courts. One necessary limitation is that when the only legitimate purpos-

es of a bankruptcy have been achieved -- i.e., the debtor has returned to solvency and all the creditors and all expenses of bankruptcy administration have been fully paid -- there is no further role for the bankruptcy court to play.

The decision below demonstrates that this message has not yet been heard in the lower courts. The decision of the Ninth Circuit allows a federal bankruptcy court to exercise its extraordinary powers in a dispute even though the bankruptcy case, and the reasons for it, have completely ended. The bankruptcy court is empowered to force an attorney to litigate in bankruptcy court, rather than state court, his entitlement to the fee his former client paid before the filing of the bankruptcy petition, for representing that client in an action in the California courts. The bankruptcy court can do this, and did in this case, notwithstanding the facts that: (a) the client is no longer insolvent; (b) the client has paid all its creditors and all expenses of bankruptcy administration at 100 cents on the dollar; (c) the bankruptcy court has dismissed the bankruptcy case in light of the client's return to solvency; and (d) the client's state law claim of entitlement to a refund of the fee is still at the pleading stage.

There is no constitutional, statutory, or public policy basis for allowing a bankruptcy court to usurp the state court's position under these circumstances.

PROCEDURAL AND FACTUAL HISTORY

Petitioner-appellant Hillel Chodos is a lawyer who represented respondent-appellee Shop Television Network (STN) in a civil action in the Los Angeles Superior Court against JC Penney Co. and QVC Network, Inc., as well as in several other actions. Petitioner's fee agreement with his client called for time charges up to $500,000 against a contingent fee based on a percentage of the amounts recovered. After petitioner had rendered substantial legal services and been paid $500,000 for his time charges, respondent filed a Chapter 11 petition in the United States Bankruptcy Court for the Central District of California. Respondent became debtor-in-possession.

Respondent subsequently filed an adversary complaint against petitioner in the bankruptcy case. That complaint initially sought only the return of $283,498.38 of the fees which respondent had paid petitioner for legal fees before the petition was filed. Later, respondent moved for and was granted leave to file a first amended adversary complaint seeking recovery of additional previous fee payments to petitioner, plus additional compensatory and punitive damages, on the basis of new allegations of fraud and breach of professional ethics. None of these claims has been litigated past the pleading stage, nor adjudicated.

Respondent also moved for a peremptory turnover order under 11 U.S.C. §329, which allows bankruptcy courts to review and cancel or re-arrange all fee transactions between the debtor and attorneys "in a case under this title, or in connection with such case" made within one year prior to the filing of the bankruptcy petition. The bankruptcy judge, whom petitioner had unsuccessfully tried to disqualify for prejudice, granted the turnover order [A1-A3]. Petitioner appealed to the District Court, and enforcement was stayed pending appeal upon petitioner's deposit of the controverted $283,498.38 in an interest-bearing account controlled jointly by petitioner and respondent's attorney. The money remains on deposit.

While petitioner's appeal was pending before the District Court, respondent (through counsel other than petitioner, appointed by the Bankruptcy Court) settled its lawsuit with JC Penney and QVC. Respondent recovered enough in that settlement to pay all of its creditors and all costs of administration of the bankruptcy case in full at 100 cents on the dollar, and to leave a multi-million dollar surplus. Respondent then went out of business and distributed its assets to its shareholders. Its only remaining business activity is the handling of its dispute with petitioner.

Once respondent had paid its debts and expenses, the Bankruptcy Court dismissed respondent's bankruptcy

case. However, the Bankruptcy Court determined that it could and would retain jurisdiction over "any pending litigation by the Debtor to recover monies allegedly due the Debtor" [A4-A7]. This referred to respondent's adversary proceeding against petitioner, and the stayed turnover claim.

Petitioner moved the District Court to vacate the turnover order and to dismiss respondent's adversary case against him for lack of subject matter jurisdiction. The District Court denied the motion [A8-A10] and subsequently affirmed the turnover order [A11-A23]. Petitioner appealed; the Ninth Circuit affirmed [A24-A37]. The District Court decision is reported at 170 Bankr. 413, 25 Bankr.Ct.Dec. (CRR) 1603. Petitioner filed a timely petition for rehearing, which the Court of Appeals denied [A38].

With respect to retaining jurisdiction, the Ninth Circuit held:

> (1) Bankruptcy Code §349 did not require dismissal of the turnover order because that statute allows the bankruptcy court to order otherwise, for cause [A 28] (however, the opinion did not identify any "cause");
>
> (2) An attorney's fee paid before bankruptcy for services in a state law, state court action which the bankrupt (after bankruptcy) considers an "important asset" of the estate is "paid in connection

with the bankruptcy action and therefore falls under [Bankruptcy Code] section 329" [A28, fn. 3, court's emphasis deleted];

(3) This Court's recognition in Celotex Corp. v. Edwards, __ U.S. __ , 115 S.Ct. 1493, 1499 (1995), that bankruptcy courts have no jurisdiction over proceedings that have no effect on the debtor or the estate is irrelevant dictum because the Ninth Circuit believed that "the issue is not whether the bankruptcy court properly exercised jurisdiction in the adversary proceeding at the outset," but whether "after a proper invocation of jurisdiction, the bankruptcy court may retain jurisdiction following dismissal of the underlying bankruptcy case" [A30]; and

(4) The decision to retain jurisdiction when dismissal of a bankruptcy is based on the debtor's return to solvency depends on the same four factors (judicial economy, convenience, fairness, and comity) as in cases where the bankruptcy is dismissed for other reasons, and there was not clear error in applying those factors here [A30-A31].

ISSUES RAISED BELOW (RULE 14(H))

Petitioner asserted the Bankruptcy Court's lack of jurisdiction to keep the turnover order in force after the

bankruptcy proceeding was dismissed at the time the issue first arose. He did this initially by motion in the District Court, and then on appeal to the Ninth Circuit.

I.

BANKRUPTCY JURISDICTION MUST TERMINATE WHEN THE REASONS FOR AFFORDING BANKRUPTCY PROTECTION CEASE TO EXIST.

It is a truism that federal courts are courts of limited jurisdiction. Another way of asking the question presented in this petition is whether, once a bankruptcy court has taken jurisdiction of a matter "related to" a bankruptcy case, that jurisdiction ever comes to an end.

This Court acknowledges that, while "'Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate,'" the "bankruptcy court's 'related to' jurisdiction cannot be limitless" (Celotex Corp. v. Edwards, supra, __ U.S. ___, 115 S.Ct. at 1499). One limit required by considerations of federalism and public policy is that "related to" jurisdiction must end when the bankruptcy has been dismissed because the debtor has returned to solvency, paid all its creditors, and paid all expenses of administration.

There is no case law stating this seemingly obvious proposition. The decision of the Ninth Circuit demonstrates a need for this Court to grant certiorari and make that rule clear.

Restructuring of debtor-creditor relations is at the core of the federal bankruptcy power (Northern Pipeline Const. v. Marathon Pipe Line Co. 458 U.S. 50, 71 (1982)). After the successful restructuring of debtor-creditor relations by a return to solvency and full payment of creditors, there is no further basis for exercise of that power.

This Court recognized in Northern Pipeline, supra, "the potential for encroachment upon powers reserved to the Judicial Branch" created by the broad grant of jurisdiction to bankruptcy courts to hear matters within their "related to" jurisdiction (458 U.S. at 74). The decision below gives rise to equal potential for encroachment upon powers reserved to the states under the Tenth Amendment. "Congress has no power to declare substantive rules of common law applicable in a state" (Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

> "Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state

cases free from interference by federal courts."
Younger v. Harris, 401 U.S. 37, 43
(1971).

Needless decisions of state law by federal courts should be avoided so as to procure for the litigants "a surer-footed reading of applicable law" (United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966)).

For a federal bankruptcy court to retain jurisdiction of a state law dispute between an attorney and former client when there is no bankruptcy case pending, and the former client is no longer within the reach of the bankruptcy laws, would be as much "'an invasion of the authority of the state, and, to that extent, a denial of its independence'" (Erie R. Co. v. Tompkins, supra, 304 U.S. at 79, quoting Baltimore & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 401 (1892)), as applying federal "common law" to any other state law dispute.

When federal district court judges apply state law in diversity cases, they act as benign substitutes for state judges. This is not the case when a bankruptcy court takes over a state law dispute. Bankruptcy courts are empowered to use extraordinary procedural devices, such as the peremptory turnover order made in this case, which have no parallel in state law, and which turn state law upside down. Manifestly, the extraordinary powers set forth in §329 are

intended to implement the Bankruptcy Clause of the Constitution by facilitating bankruptcy court administration of the estates of insolvent debtors. These powers were not, and could not constitutionally have been, intended by Congress to grant federal bankruptcy courts an unlimited and perpetual roving commission to review and regulate all relations between former debtors and any attorneys who happened to represent them in state court matters before the commencement of bankruptcy proceedings.

Petitioner does not argue that bankruptcy jurisdiction automatically and necessarily ends merely because a bankruptcy case has been dismissed. There are reasons the bankruptcy court might dismiss a bankruptcy case even though the debtor remains insolvent. For example, the case may have been filed in the wrong district, or for sham or improper reasons, or because the debtor concludes that he no longer wants or needs the protection of the bankruptcy laws. Under those circumstances, arguably a bankruptcy court may conclude that jurisdiction should be retained in order to ensure that the substantive equities of the interested parties are not frustrated for procedural reasons arising solely from the dismissal.

Likewise, it may be appropriate for a bankruptcy court to retain jurisdiction even after dismissal, to determine disputes arising from or ancillary to the administration of

the bankruptcy estate, which were fully litigated in bankruptcy court while the case was pending, but which could not effectively be resolved before the dismissal. By the same token, matters which could affect the debtor's ability to carry out a successful reorganization may well be "related to" the bankruptcy and hence an appropriate subject of bankruptcy jurisdiction (Celotex Corp. v. Edwards, supra, __ U.S. at __, 115 S.Ct. at 1500, and cases collected).

There is no such relationship in this case. There is no reorganization plan in effect; there are no remaining equitable issues left to adjust between the former debtor and its creditors; there is no case litigated in bankruptcy court to the verge of decision before the dismissal; there are no administrative loose ends left to tie up, or expenses of administration left to pay. Indeed respondent has gone out of business and dissolved. Moreover, petitioner never represented respondent in any aspect of the bankruptcy case, or in connection with any bankruptcy proceedings. Although petitioner appeared for respondent, before the bankruptcy filing, in two state court cases and one federal court action, that representation came to an end as soon as the bankruptcy court appointed new counsel for respondent.

The only transactions between respondent and petitioner ever considered by the bankruptcy court were certain fee payments respondent made to petitioner before the bank-

ruptcy filing. Petitioner maintains that those fee payments were in strict conformity with his fee agreement with respondent, and that he is legally and equitably entitled under California law to retain them. Certainly, the parties' respective rights and liabilities with respect to those fees arose "independent of and antecedent to the reorganization petition that conferred jurisdiction upon the Bankruptcy Court" (Northern Pipeline, supra, 458 U.S. at 84). The only nexus of the fees with the bankruptcy case arose from respondent's temporary insolvency and the extraordinary turnover and avoidance powers granted by the Bankruptcy Code.

It follows that, upon respondent's return to solvency and the dismissal of the bankruptcy case with full payment of all debts and expenses of administration, the only legal predicate for the exercise of federal jurisdiction evaporated, along with any claims based on the special avoidance powers provided in the Bankruptcy Code. There is no longer, nor will there ever be, any bankruptcy policy, or any federal policy, to be vindicated through further litigation in the Bankruptcy Court. If respondent continues to dispute petitioner's contention that the fee respondent paid to petitioner was proper, that dispute can and should be resolved in the California courts.

II.

GOOD CAUSE FOR RETAINING POST-DISMISSAL BANKRUPTCY JURISDICTION MUST REST ON CURRENT CONDITIONS WHICH COULD AFFECT THE ESTATE.

> "[A] proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways"
>
> Younger v. Harris, supra, 401 U.S. at 44,

all compel the conclusion that, in the absence of any basis for exercise of bankruptcy jurisdiction, state law disputes should be left to the state courts.

In its decision below, the Ninth Circuit stated that under 11 U.S.C. §349, dismissal of a bankruptcy case does not automatically divest a bankruptcy court of jurisdiction over property subject to a turnover order if the court "for cause" orders otherwise [A28]. A "proper respect for state functions" requires at a minimum that, if a bankruptcy court believes there is cause to retain property despite dismissal of the bankruptcy, it must explain what that cause is. However, in this case neither the Bankruptcy Court, nor the Dis-

trict Court, nor the Court of Appeals, ever identified any "cause" why the dismissal in this case should not have had the normal statutory effect.

Reference to concepts of judicial economy, convenience, fairness, and comity cannot provide the requisite jurisdictional underpinning for a bankruptcy court to retain jurisdiction over the state court disputes of a solvent person. Petitioner believes that this Court should make a bright line rule that bankruptcy jurisdiction always terminates when the bankrupt has returned to solvency, and has paid all its debts and bankruptcy administration costs. But in any event, given the inherent elasticity and elusiveness of those four factors, this Court should at least spell out the nature of the "cause" which warrants retention of jurisdiction in bankruptcy court in accordance with fundamental constitutional principles of federal-state relations.

CONCLUSION

Petitioner submits that there is no combination of factors which justifies nonexistent jurisdiction. It is unseemly, bad public policy, and unconstitutional for the Bankruptcy Court to appropriate decision-making power over a dispute between two citizens of the same state about a financial dispute solely governed by state law.

Therefore, petitioner respectfully prays that this Court grant certiorari, and that after briefing it reverse the

judgment below, and issue an opinion holding that a bankruptcy court may not continue to hold property under a turnover order or to retain jurisdiction after the debtor has returned to solvency and paid all its creditors and administrative expenses in full, and the court has consequently dismissed the bankruptcy proceeding.

Dated: July 2, 1996

Respectfully submitted,

WENDY COLE LASCHER
Counsel of Record
for Petitioner Hillel Chodos

APPENDIX

HERBERT KATZ (BAR NO. 33474)
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Attorneys for Debtor and
Debtor in Possession

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re	)CASE NO.
	)LA-92-15618-SB
SHOP TELEVISION	)
NETWORK, INC.,	)Chapter 11
	)
Debtor.	)ADV. PRO NO.
	)LA92-03989-SB
SHOP TELEVISION	)
NETWORK, INC.	)[PROPOSED]
	)AMENDED ORDER
Plaintiff,	)GRANTING MOTION
	)OF DEBTOR FOR
V.	)ORDER REQUIRING
	)RETURN OF EXCESS-
HILLEL CHODOS and	)IVE COMPENSATION
FIERSTEIN & STURMAN	)[11 U.S.C. §329;
	)Bankruptcy Rule
Defendants.	)2017]
	)

Date: May 4, 1993
Time: 2:00 pm
Place: Courtroom 1575, Roybal Federal Bldg.

The Debtor's Motion for an Order Requiring Return of Excessive Compensation [11 U.S.C. §329; Bankruptcy Rule 2017] against Hillel Chodos came on regularly for hearing before the undersigned Bankruptcy Judge on May 4, 1993 at 2:00 p.m. The Debtor appeared through its counsel, Stroock & Stroock & Lavan, by Herbert Katz and Eric G. Lardiere; Hillel Chodos appeared in pro per; other appearances are as noted in the record.

Upon reading and considering the Motion, the Memorandum of Points and Authorities, and good cause appearing therefor, as stated in the record, IT IS HEREBY

ORDERED that Hillel Chodos pay Debtor $283,498.38, plus interest at the rate of 3.37% from August 18, 1992, on such sum. Pursuant to 28 U.S.C. § 1961, interest is to be computed daily to the date of payment.

IT IS FURTHER ORDERED that Hillel Chodos pay the above-mentioned sums to Debtor within ten (10) days from the date of the entry of this Order. In the event Hillel Chodos does not make such payment within ten (10) days from the date of the entry of this Order, Hillel Chodos is further ordered to pay Debtor an additional sum of $1,000.00 for each day past the tenth day from entry of this Order until the principal sum above and accrued interest are paid. The amount of such additional sum shall increase from $1,000.00 to $5,000.00 per day if the principal sum

above and accrued interest are not paid by Hillel Chodos within thirty days (30) days from the date of entry of this Order.

Dated: May 20, 1993

Samuel L. Bufford
The Hon. Samuel L. Bufford
United States Bankruptcy Judge

Presented by:

HERBERT KATZ
ERIC G. LARDIERE
STROOCK & STROOCK & LAVAN

BY /S/
Eric G. Lardiere

Attorneys for Debtor and
Debtor in Possession

SEP 21 1993
ENTERED SEP 28

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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

	) Case No. LA 92-15618-SB
	)
	) Chapter 11
SHOP TELEVISION	)
NETWORK, INC.,	) ORDER AUTHORIZING
	) VOLUNTARY DISMISSAL
Debtor.	) OF DEBTOR'S BANKRUPTCY
	) CASE
	) Date: September 21, 1993
	) Time: 4:00 p.m.
	) Place: Courtroom 1575
	) Roybal Federal Bldg.
	) Los Angeles, CA 90012

On September 21, 1993 at 4:00 p.m. before the Honorable Samuel L. Bufford, United States Bankruptcy Judge, in Courtroom 1575, located at 255 East Temple Street, Los Angeles, California 90012, a hearing took place in connection with the Notice of Motion and Motion of Debtor and Debtor in Possession for Order Authorizing Voluntary Dismissal of Case and the Amended Motion of Debt-

or and Debtor in Possession for Order Authorizing Voluntary Dismissal of Case (collectively referred to as the "Motion"). Shop Television Network, Inc., debtor and debtor in possession (the "Debtor"), appeared through bankruptcy counsel of record Stroock & Stroock & Lavan by Herbert Katz and Brian S. Cohen. The Official Committee of Creditors Holding Unsecured Claims appeared through its counsel of record Robinson, Diamant, Brill & Klausner and Karl Block. LB Credit Corporation, a creditor, appeared through its counsel of record Glass, Alper, Goldberg & Cohn by Marshall F. Goldberg. QVC Network, Inc., a shareholder, appeared through its counsel of record Jeffrey Krieger. Other appearances are reflected in the official records of this Court.

The Court, having read and considered the Motion, and the evidence submitted in support of the Motion, having received no written opposition to the Motion, having heard the arguments of counsel, being fully advised in the premises, having made the findings of fact as set forth in the record of the hearing before this Court,

HEREBY ORDERS as follows;

~~1. Notice of the Motion was proper in accordance with 11 U.S.C. § 102(1), the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules of this Court;~~

2. The above-captioned bankruptcy case is dis-

missed pursuant to 11 U.S.C. § 1112(b) effective upon payment of all creditor claims and administrative expenses and to the extent that any such claims and administrative expenses have not been paid, the Debtor shall reserve 125% of such unpaid claims and administrative expenses in Stroock & Stroock & Lavan's trust account until further order of the Court;

3. The payment of all creditor claims ~~and administrative expenses~~ as set forth in the Motion is authorized and approved and Stroock & Stroock & Lavan, as the duly authorized custodian pursuant to an order of this Court of the $8,449,129 settlement payment received from J.C. Penney Company, Inc. and QVC Network, Inc. shall distribute such payments immediately upon this Order becoming final;

4. After all payments are made as set forth herein, *and administrative expenses are paid*, Stroock & Stroock & Lavan shall distribute the remaining funds to the Debtor subject to such accounts that may be reserved as set forth herein upon this Order becoming final;

5. This Court shall retain jurisdiction with respect to any disputes which may arise or may have arisen between the Debtor and the creditors or other parties in interest with respect to the satisfaction of the respective claims including, but not limited to, any and all fee applications as well as any pending litigation by the Debtor to recover monies al-

legedly due the Debtor; and

6. The Debtor shall give notice of the dismissal of the above-captioned bankruptcy case to all shareholders, creditors, and all other parties in interest.

Dated: Sept. 27, 1993 /s/
THE HONORABLE
SAMUEL L. BUFFORD
UNITED STATES
BANKRUPTCY JUDGE

Presented by:

HERBERT KATZ
BRIAN S. COHEN
STROOCK & STROOCK & LAVAN

By:/s/
Brian S. Cohen

Attorneys for SHOP TELEVISION
NETWORK, INC., Debtor and
Debtor in Possession

FILED JANUARY 25, 1994
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d)

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

In re

SHOP TELEVISION NETWORK, INC.,

Debtor,

SHOP TELEVISION NETWORK, INC.,

Plaintiff,

v.

HILLEL CHODOS and FIERSTEIN & STURMAN LAW CORPORATION,

Defendants.

District Court
Case No. CV 93-4384-RJK
Bankruptcy Case No.
LA 92-15618-SB
Chapter 11 Adversary No.
LA 92-03989-SB

ORDER
Entered January 26, 1994

This matter came on for hearing on January 24, 1994 on the Motion to Vacate Turnover Order and Dismiss Case for Lack of Jurisdiction filed by Appellant Hillel Chodos.

The Court, having read and considered the papers submitted in support of and opposition to the motion, as well as having heard oral argument thereon, determines as follows:

The dismissal of a bankruptcy case reinstates any transfer avoided under 11 U.S.C. § 547 and revests the property of the estate in the entity in which such property was vested immediately before the commencement of the bankruptcy case, unless the court "for good cause" orders otherwise. 11 U.S.C. § 349(b).

In the proceedings before the Bankruptcy Court, the Bankruptcy Court, in an order dated September 28, 1993, purported to retain jurisdiction over "any pending litigation by the Debtor to recover monies allegedly due the Debtor[.]" Such a retention of jurisdiction is entirely appropriate. 11 U.S.C. § 349(b). This Court is therefore convinced that the Bankruptcy Court retained jurisdiction over the instant dispute.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED AND ADJUDGED that Appellant Chodos' Motion to Va-

cate the Turnover Order is DENIED.

Dated: Jan. 24, 1994 /s/

ROBERT J. KELLEHER
UNITED STATES DISTRICT
JUDGE

District Court Case No. CV 93-4384-RJK

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

July 25, 1994, Decided
July 25, 1994, Filed
July 26, 1994, Entered

In re SHOP TELEVISION NETWORK, INC.,
Debtor.

SHOP TELEVISION NETWORK, INC.,
Plaintiff,

v.

HILLEL CHODOS and FIERSTEIN & STURMAN LAW CORPORATION,
Defendants.

OPINION: MEMORANDUM OF DECISION AND ORDER AFFIRMING BANKRUPTCY COURT TURNOVER ORDER

This is an appeal from a May 26, 1993, bankruptcy court order requiring Appellant Hillel Chodos ("Chodos") to return $283,498.38 of excessive compensation (the "Turnover Order"). The Court, having read and considered all papers filed by the parties, and having heard oral argument thereon, finds as follows:

I. BACKGROUND

Appellant Chodos is a California lawyer who represented Respondent Shop Television Network, Inc. ("STN") in connection with STN's lawsuit against J.C. Penney Company, Inc. ("J.C. Penney") for breach of contract (the "J.C. Penney litigation"). On February 11, 1992, STN issued a check in the amount of $283,498.38 to Chodos. The next day, on February 12, 1992, STN filed a petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Central District of California.

Shortly after the bankruptcy petition was filed, STN filed an application before the bankruptcy court for an order approving the retention of Chodos as its special counsel to handle the litigation for STN (as debtor-in-possession) against J.C. Penney. After STN withdrew this application, it filed a renewed application which Judge Bufford, the presiding bankruptcy judge, denied on August 18, 1992. Judge Bufford was influenced by the fact that Chodos indicated that he would not keep time records and that he charged between $750 and $1000 per hour for his time.

On July 17, 1992, STN filed an adversary complaint in the bankruptcy case against Chodos and the law firm of Fierstein & Sturman, whom Chodos had associated to handle the J.C. Penney litigation, seeking recovery of the $283,498.38 paid to Chodos the day before STN filed for bankruptcy (the "adversary proceeding"). On November 4,

1992, Chodos filed an answer and counterclaim in the adversary proceeding.

On January 20, 1993, STN filed a motion in the bankruptcy court for leave to file a first amended complaint. The motion was scheduled for hearing on February 10, 1993, before Judge Bufford. The record reveals that Chodos was not served with a copy of this motion. The record further reveals that Chodos did not file an opposition to the motion, nor did he attend the hearing on the motion. On February 10, 1993, Judge Bufford granted STN's motion for leave to file a first amended complaint.

As soon as Chodos learned of this occurrence, he contacted counsel for STN. As a result, on April 7, 1993, STN re-filed its motion for leave to file a first amended complaint. This time, Chodos was served. On April 8, 1993, STN filed a motion for an order requiring the return of excessive compensation, to wit, the $283,498.38 paid to Chodos one day before STN filed for bankruptcy. Both these motions were set for hearing on May 4, 1993.

Also on April 8, 1993, Chodos filed a motion to disqualify Judge Bufford. This motion was set for hearing on May 25, 1993. On April 20, 1993, Chodos filed an affidavit under 28 U.S.C. § 144 alleging that Judge Bufford was biased and prejudiced against him. This affidavit was accompanied by the requisite certificate of good faith. Rely-

ing on his motion to disqualify Judge Bufford and his affidavit of prejudice, Chodos chose to forego filing any opposition on the merits to STN's motion for return of the $283,498.38 and motion for leave to file a first amended complaint. Instead, on April 27, 1993, Chodos filed a two-page opposition in which he stated that he had filed a motion to disqualify Judge Bufford, and that "the filing of Chodos' response on the merits will be deferred until a new judge has been assigned."

On May 4, 1993, at the hearing on STN's motion for turnover of excessive compensation and for leave to file a first amended complaint, Judge Bufford indicated that he thought that Chodos' affidavit of prejudice was both untimely and insufficient and orally granted STN's motion for turnover of excessive compensation and motion for leave to file a first amended complaint. Judge Bufford further ordered, sua sponte, that if Chodos did not comply with the Turnover Order with ten (10) days he would have to pay a penalty of $1,000.00 per day and if he did not comply with the Turnover Order within 30 days, he would have to pay $5,000.00 per day thereafter until the money was turned over (the "penalty provision").

These rulings were incorporated in formal orders which were entered on or about May 21, 1993. Chodos

filed a timely notice of appeal on May 25, 1993.[1/] On May 26, 1993, Chodos filed a motion for a stay of the Turnover Order pending appeal and fixing security pending the appeal. Chodos proposed to place the $283,498.38 in a bank account jointly controlled with counsel for STN. A hearing was held on this motion the following day, May 27, 1993. At this hearing, pursuant to a request from counsel for STN, Judge Bufford deleted from the Turnover Order the penalty provisions referred to above. Upon the deposit of the $283,498.38 into a joint bank account, Judge Bufford granted Chodos' motion to stay.

On this appeal, the Court is asked to determine whether Judge Bufford acted properly in issuing the Turnover Order. Jurisdiction exists pursuant to 28 U.S.C. § 158.

II. STANDARD OF REVIEW

This Court applies the same standard of review to the bankruptcy court findings as does the court of appeals: findings of fact are reviewed under the clearly erroneous standard; conclusions of law are reviewed de novo. In re Tucson Estates, Inc., 912 F.2d 1162, 1166 (9th Cir. 1990).

III. DISCUSSION

The bankruptcy court entered the Turnover Order

[1/] The record does not reveal whether the hearing on Chodos' motion to disqualify Judge Bufford, which had been set for May 25, 1993, ever occurred.

pursuant to the authority vested in it by 11 U.S.C. § 329.[2/] As an initial matter, the Court notes that Chodos cannot now challenge the applicability of 11 U.S.C. 329 to the fees paid Chodos in connection with the J.C. Penney litigation, since Chodos did not include this issue in his designation of issues on appeal Fed. R. Bankr. P. 8006; In re Pine Mountain, Ltd., 80 Bankr. 171, 172 (Bankr. 9th Cir. 1987).

Analyzing the propriety of the Turnover Order therefore depends upon the resolution of the following two issues: (1) whether the mere filing of Chodos' affidavit of prejudice pursuant to 28 U.S.C. § 144 automatically divest-

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[2/] 11 U.S.C. § 329 provides as follows:

"(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to -

(1) the estate, if the property transferred -

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or

(2) the entity that made such payment."

ed Judge Bufford of authority to rule on STN's motion for turnover of excessive compensation; and (2) whether Judge Bufford properly determined that Chodos' affidavit of prejudice was untimely and insufficient.[3/]

A. The Filing of the Affidavit of Prejudice.

Chodos argues that upon the timely filing of a proper affidavit of prejudice pursuant to 28 U.S.C. § 144, a judge is automatically divested of the authority to act any further on the case with respect to which the affidavit is filed.[4/] However, it is well settled law that the mere filing of

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[3/] Chodos has not argued that the mere filing of a motion for disqualification pursuant to 28 U.S.C. § 455 operates to prevent the judge against whom the motion is directed from acting on the case prior to the hearing on the motion for disqualification. In this case, the Turnover Order was issued prior to the hearing on Chodos' motion for disqualification. Consequently, the Court need not address whether the motion for disqualification had any impact upon Judge Bufford's authority to enter the Turnover Order.

[4/] 28 U.S.C. § 144 provides that: "whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the

(continued...)

an affidavit under 28 U.S.C. § 144 does not automatically disqualify a judge. United States v. Bray, 546 F.2d 851, 857 (10th Cir. 1976) (citing United States v. Townsend, 478 F.2d 1072, 1073 (3d Cir. 1973)); Commonwealth of Pa. v. Local Union 542, Int'l Union of Operating Eng'rs, 388 F. Supp. 155, 158 (E.D. Pa. 1974). Before an affidavit filed under 28 U.S.C. § 144 will operate to disqualify a judge, the affidavit must be found to be both timely and sufficient. Townsend, 478 F.2d at 1073.

"A trial judge has as much obligation not to recuse himself when there is no reason to do so as he does to recuse himself when the converse is true." Bray, 546 F.2d at 857 (citations omitted). Thus, it is for the trial judge to determine whether the affidavit is timely and sufficient. Any other rule of law would provide attorneys with an almost unfettered means of delaying judicial proceedings. Were this not the rule, an attorney who was unable to obtain a continuance by resort to appropriate means could simply file an affidavit of prejudice and obtain the desired continuance.

4/(...continued)
proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

Judge Bufford therefore properly determined that the mere filing of the affidavit of prejudice did not result in his disqualification. Indeed, Judge Bufford was under an obligation to determine whether the affidavit was both timely and sufficient before taking the drastic step of disqualifying himself. See Bray, 546 F.2d at 857. As such, Chodos' appeal turns upon whether Judge Bufford properly determined that Chodos' affidavit of prejudice was untimely and insufficient.

B. Timeliness and Sufficiency of the Affidavit of Prejudice

At the hearing on May 4, 1993, Judge Bufford indicated that he thought that Chodos' affidavit of prejudice was untimely and insufficient and orally granted STN's motion for turnover of excessive compensation and motion for leave to file a first amended complaint. Based upon a review of the record, the Court finds that Judge Bufford correctly determined that the affidavit was insufficient, but incorrectly determined that the affidavit was not timely.

1. Timeliness

Chodos filed his affidavit of prejudice on April 20, 1993. Assuming, arguendo, that the basis upon which Chodos relied in filing his affidavit of prejudice are suffi-

cient, the Court cannot say that the affidavit was untimely.[2/] Chodos filed the affidavit of prejudice approximately one week after obtaining the transcript to the April 6, 1993, hearing. The Court therefore finds that Chodos' affidavit of prejudice was timely filed, and that Judge Bufford erred when he found the opposite to be true. However, because the Court finds that the evidence of prejudice contained in the 28 U.S.C. § 144 affidavit is insufficient as a matter of law, Judge Bufford's error is harmless.

2. Sufficiency

It has long been the rule that, with respect to affidavits of prejudice filed pursuant to 28 U.S.C. § 144, "the alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his

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[2/] The main ground upon which Chodos relies as evidence of Judge Bufford's prejudice against him is the fact that Judge Bufford initially granted STN's motion for leave to file a first amended complaint on February 10, 1993, without having received the benefit of an opposition from Chodos. Chodos also seems to place great significance upon the fact that he was not notified of a hearing, the purpose of which is unclear from the record, which was held on April 6, 1993, before Judge Bufford at which the subject of the first amended complaint was discussed. Chodos argues that denial of STN's application to employ Chodos as special counsel, demonstrate Judge Bufford's "prejudice" against Chodos.

participation in the case." United States v. Grinnell Corp., 384 U.S. 563, 583, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966) (citation omitted). This rule has come to be known as the "extrajudicial source" doctrine.

Recently, in connection with a motion for disqualification under 28 U.S.C. § 455(a), The Supreme Court had occasion to more carefully delineate the boundaries of the "extrajudicial source" doctrine. In Liteky v. United States, 127 L. Ed. 2d 474, U.S. , 114 S. Ct. 1147 (1994), the Court stated:

It is wrong in theory, though it may not be too far off the mark as a practical matter, to suggest, as many opinions have, that "extrajudicial source" is the only basis for establishing disqualifying bias or prejudice. It is the only common basis, but not the exclusive one, since it is not the exclusive reason a predisposition can be wrongful or inappropriate. A favorable or unfavorable predisposition can also deserve to be characterized as "bias" or "prejudice" because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment. Liteky, 114 S. Ct. at 1155. This limitation on the extrajudicial source doctrine applies both to motions brought pursuant to 28 U.S.C. § 455 and affidavits of prejudice filed pursuant to 28 U.S.C. § 144. Id. at 1155-57.

In the instant case, although no rule of law prevents Chodos from attempting to demonstrate prejudice by relying upon facts adduced or events occurring before the bankruptcy court, Chodos' attempt to do so here falls far short of the mark. Chodos has made no showing that any predisposition which Judge Bufford might possess against him because of his involvement with STN's bankruptcy "is so extreme as to display clear inability to render fair judgement." Id. at 1155. While Judge Bufford may have given vent to a slight degree of frustration that the "Chodos matter" had not yet been resolved, such frustration is not wholly unusual or indicative of any inability to maintain impartiality and judicial decorum.

Likewise, the mere fact that Chodos was not served with notice of the first hearing on STN's motion to file a first amended complaint does not demonstrate the degree of prejudice necessary to require disqualification. Even if the Court were to find, as Chodos argues, that the February 10, 1993, hearing amounted to an ex parte communication, this would not free Chodos of the requirement that he demonstrate that Judge Bufford was biased against him. Willenbring v. United States, 306 F.2d 944, 946 (9th Cir. 1962). Accordingly, the Court finds that the allegations of bias contained in Chodos' affidavit of prejudice are insufficient as a matter of law to require disqualification of Judge

Bufford. Judge Bufford was therefore not precluded from ruling on STN's pending motions at the hearing on May 4, 1993.

While it may appear a harsh result to uphold the Turnover Order even though Chodos did not file an opposition on the merits, it must be stressed that Chodos was served with timely notice of this motion and consciously decided to forego filing an opposition on the merits. Instead, Chodos gambled on his false assumption that the mere filing of the affidavit of prejudice automatically disqualified Judge Bufford. Had Chodos moved for a continuance of the motion for return of excessive compensation until after the hearing on his motion for disqualification, Chodos may have had an opportunity to file an opposition on the merits. Indeed, the more prudent course of action would have been to file an opposition on the merits just in case Chodos' understanding of the effect of the filing of an affidavit of prejudice was mistaken. Chodos' failure to take these rudimentary precautions is not a basis for relief.

IV. ORDER

The Court finds that Judge Bufford did not commit reversible error in issuing the Turnover Order; hence, the order of the bankruptcy court is AFFIRMED.

DATED: July 25, 1994
ROBERT J. KELLEHER
UNITED STATES DISTRICT JUDGE

FILED
MAR 06 1996

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re SHOP TELEVISION NETWORK, INC.,
Debtor,

SHOP TELEVISION NETWORK, INC.,
Plaintiff-Appellee,

v.

HILLEL CHODOS,
Defendant-Appellant,

and

FIERSTEIN & STURMAN LAW CORPORATION,
Defendant.

No. 94-56225

D.C. No. CV-93-04384-RJK

MEMORANDUM*/

Appeal from the United States District Court
for the Central District of California
Robert J. Kelleher, District Judge, Presiding
Argued and Submitted February 6, 1996
Pasadena, California

Before: POOLE, WIGGINS, and RYMER, Circuit Judges.

OVERVIEW

Hillel Chodos, an attorney, appeals pro se the district court's order affirming the bankruptcy court's turnover order, which directed Chodos to return $283,498.38 in excessive attorney's fees to Shop Television Network, Inc. ("STN"), in an adversary action related to STN's bankruptcy.1/He contends that the turnover order should be vacated

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*/ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

1/This appeal encompasses not only the district court's order affirming the turnover order, but also the district court's prior order, upholding the bankruptcy court's retention of jurisdiction upon dismissal of the underlying bankruptcy action and denying Chodos's motion to vacate the turnover order and dismiss the case for lack of jurisdiction. Although Chodos may have brought an interlocutory appeal of the order regarding jurisdiction, he is not precluded from raising the jurisdiction issue now. See In re Frontier Properties,

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because the dismissal of the bankruptcy action pending the appeal of the turnover order to the district court deprived the bankruptcy court of subject matter jurisdiction. Alternatively, he requests that the turnover order be vacated and this matter be remanded to a different bankruptcy judge because the district court erred in finding that the bankruptcy judge was not biased against him. Chodos further requests that, if the bankruptcy judge is not disqualified for bias, we vacate the turnover order and remand the matter to the same bankruptcy judge to allow Chodos an opportunity to oppose STN's motion for a turnover order on the merits. We have jurisdiction pursuant to 28 U.S.C. § 158(d), and we affirm.

DISCUSSION

I. JURISDICTION

We review conclusions of law by the bankruptcy court and district court de novo. In re Frontier Properties, Inc., 979 F.2d 1358, 1362 (9th Cir. 1992). The bankruptcy court's decision to retain jurisdiction is reviewed for abuse of discretion and is reversed only if we have "'a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of

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1/(...continued)
979 F.2d 1358, 1364 (9th Cir. 1993) (failure to appeal an interlocutory order does not bar raising the issue after entry of final judgment).

the relevant factors.'" In re Carraher, 971 F.2d 327, 328 (9th Cir. 1992).

In its order dismissing the underlying bankruptcy action, the bankruptcy court expressly retained jurisdiction over the fees dispute between STN and Chodos, pursuant to 11 U.S.C. 349. [2/] Chodos contends that the retention of jurisdiction is improper because federal jurisdiction ended upon dismissal of the bankruptcy action and the payment of STN's debts. Alternatively, he contends that judicial economy, convenience, fairness, and comity weigh against retaining federal jurisdiction. For the following reasons, we hold that the bankruptcy court did not abuse its discretion in retaining jurisdiction.

The Bankruptcy Code, Title 11 of the United States Code, does not automatically divest a bankruptcy court of jurisdiction over related cases upon dismissal of the underlying bankruptcy case. See 11 U.S.C. § 349 (effect of a dis-

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[2/]The order provides:

This Court shall retain jurisdiction with respect to disputes which may arise or may have arisen between the Debtor or creditors or other parties in interest with respect to the satisfaction of the respective claims, including, but not limited to, any and all fee applications as well as any pending litigation by the Debtor to recover monies allegedly due Debtor.

missal of the bankruptcy action). Moreover, section 349 only provides that, unless the court, for cause, orders otherwise, a dismissal of the bankruptcy action vacates any order, judgment, or transfer ordered, under 11 U.S.C. §§ 522(i)(1), 542, 550 or 553. Id. Thus, section 349 neither vacates the turnover order at issue, which is premised on 11 U.S.C. § 329 and Bankruptcy Rule 2017,[3/] nor prevents the bankruptcy court from retaining jurisdiction over the parties' fees dispute.

[3/] Section 329 authorizes the bankruptcy court to order an attorney, who represented the debtor in the bankruptcy action or in connection with such an action, to return to the estate any compensation that exceeds the value of the services rendered. See 11 U.S.C. § 329 (emphasis added). Rule 2017 provides that the bankruptcy court may review any payment to an attorney by the debtor that was made in contemplation of the filing of the bankruptcy petition. See Fed. R. Bankr. P. 2017.

Although the district court did not consider Chodos's argument that section 329 does not apply to his fees because he did not represent STN in the bankruptcy action, we address this argument because it implicates the court's jurisdiction. See Royal Ins. v. Sea-Land Serv. Inc., 50 F.3d 723, 729 (9th Cir. 1995). STN paid Chodos $ 283,498.38, the subject of the turnover order, on the day before it filed for Chapter 11 bankruptcy. That amount represented the balance of a fee for Chodos's continued representation of STN in a breach of contract action in state court. It is undisputed that STN considered the state action to be an important asset. Accordingly, we find that the fee was paid in connection with the bankruptcy action and therefore falls under section 329.

In addition, we have specifically held that bankruptcy courts are not automatically divested of jurisdiction over related cases when the underlying bankruptcy case is dismissed. See In re Carraher, 971 F.2d at 328 ("If Congress wished to terminate bankruptcy jurisdiction over related cases when the underlying bankruptcy case is dismissed, it presumably would have said so in section 349 or elsewhere."); cf. In re Franklin, 802 F.2d 324, 326 (9th Cir. 1986) (holding that bankruptcy courts retain subject matter jurisdiction to construe prior orders notwithstanding dismissal of the bankruptcy proceeding because such proceedings arise under Title 11); In re Tennessee Valley Ctr. for Minority Economic Dev., Inc., 99 Bankr. 845, 847 (W.D. Tenn. 1989) (bankruptcy court may retain jurisdiction over fees dispute despite dismissal of bankruptcy case because 11 U.S.C. § 349 and Bankruptcy Rule 2017 impose a duty on the court to review the pre-petition fee paid to the attorney). We did not limit the holding in Carraher by the circumstances of the dismissal of the bankruptcy action; therefore, Chodos's contention that the fact the debtor has paid its creditors precludes application of this rule lacks merit.[4/]

[4/] Similarly, Chodos's contention that STN's alleged dissolution converts the fees dispute into an action solely for the benefit of STN's shareholders is irrelevant to the question of subject matter jurisdiction. Accordingly, we deny Chodos's

(continued...)

Chodos's reliance on dicta in Celotex Corp. v. Edwards, 131 L. Ed. 2d 403, 115 S. Ct. 1493, 1499 (1995), is also unavailing. Chodos cites language in Celotex regarding the test used to determine whether a civil proceeding is sufficiently related to the bankruptcy case to warrant bankruptcy jurisdiction over the civil action. This test is irrelevant to this appeal. Here, the issue is not whether the bankruptcy court properly exercised jurisdiction in the adversary proceeding at the outset. Instead, the issue is whether, after a proper invocation of jurisdiction, the bankruptcy court may retain jurisdiction following dismissal of the underlying bankruptcy case.

Similar to the analysis used to determine if a district court should exercise jurisdiction over pendent state claims upon dismissal of all federal claims, the bankruptcy court shall consider judicial economy, convenience, fairness and comity in determining whether it should exercise jurisdiction over the related case following dismissal of the bankruptcy action. In re Carraher, 971 F.2d at 328. We hold that the bankruptcy court's application of the Carraher factors is not clear error. Judicial economy supports the retention of ju-

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[4/](...continued)
Request for Judicial Notice of STN's Proxy Statement, which purports to be proof of STN's dissolution, as irrelevant.

risdiction because the bankruptcy court is familiar with STN's arguments for the reimbursement of the unearned fee, notwithstanding the lack of discovery conducted in this matter. Comity also supports the bankruptcy court's continued jurisdiction. STN's complaint seeks relief under both the Bankruptcy Code and state law. Chodos concedes that, if the bankruptcy court retains jurisdiction, it will need to examine whether STN can maintain its claims under the Bankruptcy Code. The final two factors-- convenience and fairness-- do not weigh in favor or against retention of jurisdiction. Because Chodos practices in Los Angeles, remaining in the bankruptcy court in the Central District of California will not inconvenience him. Furthermore, Chodos's prior willingness to represent STN in its bankruptcy action may be deemed to constitute his assent to appear before the bankruptcy court.

For the foregoing reasons, because the Carraher factors weigh in favor of retaining jurisdiction, the bankruptcy court did not abuse its discretion in retaining jurisdiction over the parties' fees dispute.

II. RECUSAL [5/]

[5/] The bankruptcy court never ruled on Chodos's motion for disqualification under 28 U.S.C. § 455. Because the district court's affirmance is based only on the 28 U.S.C. § 144 affidavit of prejudice, the section 455 motion is not at issue

(continued...)

We review the bankruptcy court's denial of a recusal motion under 28 U.S.C. § 144 for abuse of discretion. United States v. $292,888.04 U.S. Currency, 54 F.3d 564, 566 (9th Cir. 1995).

The issue is whether Chodos's affidavit of prejudice was sufficient to cause Bankruptcy Judge Bufford's disqualification under 28 U.S.C. § 144.[6] Legal sufficiency requires that the "facts and reasons for the charge be set out and give fair support to the accusation, and that upon its face the affidavit presents evidence of good faith." Willenbring v. United States, 306 F.2d 944, 946 (9th Cir. 1962). The court must accept the facts alleged as true. Id. Mere conclusory allegations, however, are insufficient to require recusal. $292,888.04 U.S. Currency, 54 F.3d at 567; see also United States v. Sykes, 7 F.3d 1331, 1339 (7th Cir. 1993) ("The facts must be sufficiently definite and particular to convince

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[5](...continued)
on appeal.

[6] Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

28 U.S.C. § 144 (1994).

a reasonable person that bias exists; simple conclusions, opinions, or rumors are insufficient.").

Section 144 requires disqualification in two situations: (1) when the alleged bias stems from an extrajudicial source and is the basis of an opinion on the merits (see United States v. Grinnell Corp., 384 U.S. 563, 583, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)) and (2) when a favorable or unfavorable predisposition, "even if it springs from the facts adduced or the events occurring at trial, . . . is so extreme as to display clear inability to render fair judgment." Liteky v. United States, 114 S. Ct. 1147, 1155, 127 L. Ed. 2d 474 (1994). Here, all of Chodos's allegations of prejudice refer to events occurring at prior judicial proceedings. For the following reasons, we conclude that Chodos has not shown any grounds for disqualification of the bankruptcy court judge.

Chodos's allegations of bias focus on the hearings conducted by the bankruptcy court on February 10, 1993 and April 6, 1993.[2/] First, he contends that the court helped draft the amended adversary complaint, which added new

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[2/] The February 10 hearing addressed STN's first motion to amend the complaint, which was not served on Chodos. The April 6 hearing addressed fee applications made by attorneys involved in the bankruptcy action. The court did not hear any argument on the merits of STN's claims against Chodos at these hearings.

claims and allegations of fraud, at the February and April hearings. His affidavit, however, merely alleges that Judge Bufford asked if STN had recovered the fees from Chodos and expressed his "dismay" that the case had "not moved forward the way it should have been." These comments are merely expressions of impatience with the progress of the case and do not establish partiality. See Liteky, 114 S. Ct. at 1157. In fact, the affidavit reveals that it was the committee of unsecured creditors that sought to have the fraud claims added to the adversary complaint. These allegations do not support finding that the bankruptcy judge himself participated in writing the amended complaint.

Second, Chodos alleges that because the bankruptcy court heard negative comments about him at those hearings, which he characterizes as ex parte communication, the court was predisposed to granting STN's renewed motion to amend on May 4, 1993. This conclusory statement is unavailing. "Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current, or prior proceedings, do not constitute . . . bias or partiality . . . unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." Liteky, 114 S. Ct. at 1157. Because a judicial ruling alone almost never constitutes a valid basis for a § 144 motion, see id., Chodos needs to allege facts regarding the bankrupt-

cy judge's deep-seated antagonism for him. His affidavit falls short.

Third, Chodos's absence at the February 10 and April 6 hearings is irrelevant. Chodos does not allege that the judge was aware that STN's first motion to amend was not properly served at the time of the February hearing. Nor did the bankruptcy court discuss the merits of the fees dispute between STN and Chodos at the April hearing. Fourth, the fact that Judge Bufford initially imposed a penalty provision in the turnover order does not support a finding of prejudice, in light of his ultimate deletion of that provision.

Lastly, Chodos contends that the bankruptcy court's decision to strike the affidavit and grant STN's motions as unopposed at the May 4, 1993 hearing, without any advance notice, shows the judge's hostility toward Chodos. This allegation, even if true, does not show partiality. Section 144 does not require the court to inform Chodos of its ruling in advance. Chodos argued at the hearing that such notice is the standard procedure in other courts. Judge Bufford stated that "that's not the practice here, sir." Nowhere in the affidavit does Chodos contend that the court is legally required to provide such notice or has provided such notice for other parties.

In sum, the affidavit stated no facts showing bias and Chodos's conclusions of bias were properly disregarded

by the bankruptcy judge. Accordingly, Judge Bufford's refusal to disqualify himself was not an abuse of discretion.

III. THE BANKRUPTCY COURT'S REFUSAL TO GRANT CHODOS ADDITIONAL TIME TO OPPOSE STN'S MOTIONS ON THE MERITS

We review the denial of an extension of time for filing an opposition brief for abuse of discretion. Daily Mirror, Inc. v. New York News, Inc., 533 F.2d 53, 56 (2d Cir.), cert. denied, 429 U.S. 862, 97 S. Ct. 166, 50 L. Ed. 2d 140 (1976).

Chodos had the opportunity to file an opposition brief, and chose to file a two-page response that did not address the merits of STN's motions because he believed that the filing of his motion and affidavit for recusal prevented Judge Bufford from ruling on STN's motions until he ruled on the recusal motion, which was set for argument over a week after the hearing on STN's motions. Even if Judge Bufford had decided to recuse himself, Chodos was obligated to file a timely opposition to STN's motions, unless the STN motions were continued to a later date by the court or the parties. Thus, Chodos's belief regarding Judge Bufford's alleged bias is irrelevant as to when his opposition was due.

Accordingly, the bankruptcy court did not abuse its discretion by denying Chodos additional time to oppose STN's motions on the merits.

IV. SANCTIONS

Because Chodos's arguments are not wholly without merit and there is no showing of bad faith by Chodos, we deny STN's request for attorney's fees and costs, pursuant to Fed. R. App. P. 38 and 28 U.S.C. § 1927. See In re Eisen, 14 F.3d 469, 471 (9th Cir. 1994); Wages v. IRS, 915 F.2d 1230, 1235 (9th Cir. 1990), cert. denied, 498 U.S. 1096, 111 S. Ct. 986, 112 L. Ed. 2d 1071 (1991).

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's orders and DENY Chodos's Request for Judicial Notice and STN's request for attorney's fees and costs.

FILED
APR - 8 1996
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS
NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re SHOP TELEVISION NETWORK, INC.,	)	
Debtor,	)	
SHOP TELEVISION NETWORK, INC.,	)	No. 94-56225
Plaintiff-Appellee,	)	D.C. No. CV-93-04384-RJK
v.	)	
HILLEL CHODOS,	)	ORDER
Defendant-Appellant,	)	
and	)	
FIERSTEIN & STURMAN LAW CORPORATION,	)	
Defendant.	)	

Before: POOLE, WIGGINS, and RYMER, Circuit Judges.

The petition for rehearing filed on March 20, 1996 is DENIED.

§ 329. Debtor's transactions with attorneys

(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to--

(1) the estate, if the property transferred--

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or

(2) the entity that made such payment.

§ 349. Effect of dismissal

(a) Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.

(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title--

(1) reinstates--

(A) any proceeding or custodianship superseded under section 543 of this title;

(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 (3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

(2)

Supreme Court, U.S.
FILED
AUG 7 1996
CLERK

No. 96-33

In The

Supreme Court of the United States

October Term, 1995

HILLEL CHODOS,

Petitioner,

v.

SHOP TELEVISION NETWORK, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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82 pp

QUESTION PRESENTED

The Court of Appeals held that neither Bankruptcy Code § 349 nor considerations of judicial economy, convenience, fairness and comity require dismissal of a bankruptcy court's order to return funds which had been paid by the debtor to Petitioner as an advance on the eve of the debtor's bankruptcy filing. Should the Court review the Court of Appeal's decision, given that:

(1) The decision does not conflict with any decision of any other federal circuit or any state circuit of last resort;

(2) The decision raises no substantial federal issue;

(3) The decision is in conformance with the strong federal policy to protect creditors and debtors against overreaching attorneys; and

(4) The decision is unpublished and may not be cited as precedent in the Ninth Circuit.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 5

REASONS FOR DENYING THE WRIT 6

I. CHODOS IMPROPERLY MAKES ARGUMENTS FOR THE FIRST TIME IN THIS COURT 6

II. THERE IS NO CONFLICT IN DECISIONS JUSTIFYING REVIEW 8

III. THERE IS NO IMPORTANT FEDERAL QUESTION TO REVIEW 9

IV. THE PETITION FAILS TO IDENTIFY A REASON WHY THIS COURT SHOULD IGNORE IMPORTANT FEDERAL POLICY 12

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Celotex Corp. v. Edwards, ___ U.S. ___, 115 S.Ct. 1493 (1995) 9

Chapman v. Currie Motors, Inc., 65 F.3d 78 (7th Cir. 1995), *reh'g en banc denied*, 1996 U.S. App. LEXIS 549 (7th Cir. Jan. 12, 1996) 8, 12

Conrad Rubi & Lesser v. Pender, 289 U.S. 472 (1933) 13

Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981) 7

Duignan v. United States, 274 U.S. 195 (1927) 7

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 10

Harrell v. 20th Century Ins. Co, 934 F.2d 203 (9th Cir. 1991) 10

Heckler v. Campbell, 461 U.S. 458 (1983) 7

Hoover v. Ronwin, 466 U.S. 558 (1984), *reh'g denied*, 467 U.S. 1268 (1984) 7

In re Carraher, 971 F.2d 327 (9th Cir. 1992) 8

In re Dixon, 143 B.R. 671 (Bankr. N.D. Tex. 1992) 13

In re Fox, 140 B.R. 761 (Bankr. D.S.D. 1992) 14

In re Franklin, 802 F.2d 324 (9th Cir. 1986) 7

In re Fricker, 131 B.R. 932 (Bankr. E.D. Pa. 1991) 15

In re Hulse, 66 B.R. 681 (Bankr. M.D. Fla. 1986) 7

In re Johns-Manville Corp., 36 B.R. 727 (Bankr. S.D.N.Y. 1984) 7

In re Lowe, 97 B.R. 547 (Bankr. W.D. Mo. 1987) 15

TABLE OF AUTHORITIES – Continued

Page

In re Mills, 170 B.R. 404 (Bankr. D. Ariz. 1994) 13

In re Morris, 950 F.2d 1531 (11th Cir. 1992) 8

In re Pocklington, 21 B.R. 199 (Bankr. S.D. Cal. 1982) 11

In re Samford, 102 B.R. 724 (Bankr. E.D. Mo. 1989), *aff'd*, 125 B.R. 230 (E.D. Mo. 1989) 15

In re Smith, 866 F.2d 576 (3rd Cir. 1989) 8

In re Stardust Inn, Inc., 70 B.R. 888 (Bankr. E.D. Pa. 1987) 11

In re Tennessee Valley Center for Minority Economic Development, Inc., 99 B.R. 845 (Bankr. W.D. Tenn. 1989) 15

In re Walters, 868 F.2d 665 (4th Cir. 1989) 13

In re Wood, 210 U.S. 246 (1908) 11, 13

Matter of Querner, 7 F.3d 1199 (5th Cir. 1993) 8

McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940) 7

Post v. Ewing, 119 B.R. 566 (S.D. Ohio 1989) 14

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 10

Younger v. Harris, 401 U.S. 37 (1971) 9

CONSTITUTION, STATUTES, AND RULES

11 U.S.C. § 329 ..... *passim*

11 U.S.C. § 349 .....1, 9

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1334(b) 1

28 U.S.C. § 1367 10

Bankruptcy Act of 1898 § 60d 12, 13

Federal Rules of Bankruptcy Procedure Rule 2017 .....1, 3, 13, 14

Supreme Court Rule 10 5

Supreme Court Rule 14.1(f) 1

U.S. Constitution, Article I, Section 8, Clause 4..... 1

U.S. Constitution, Tenth Amendment..... 6

STATUTORY PROVISIONS

The constitutional and statutory provisions involved in the case are not accurately set out in the Petition as required by Rule 14.1(f). This case does not involve the U.S. Constitution, Article I, Section 8, Clause 4. Nor does this case involve 28 U.S.C. § 1334(b), except to the extent that it originally provided the bankruptcy court with jurisdiction.

The statutes involved in this case are 11 U.S.C. §§ 329 and 349. The provisions of these statutes are set forth at pages A39-A40 of the Appendix to the Petition. Rule 2017(a) of the Federal Rules of Bankruptcy Procedure is also involved in this case and provides:

> On motion by a party-in-interest or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property by the debtor, made directly or indirectly and in contemplation of the filing of a petition under the Code by or against the debtor or before entry of the order for relief in an involuntary case to an attorney for services rendered or to be rendered is excessive.

STATEMENT OF THE CASE

This Petition is by Hillel Chodos ("Chodos"), an attorney who represented Respondent Shop Television Network, Inc. ("STN") in a state court civil proceeding ("State Lawsuit"). Chodos was paid a large retainer on the eve of STN's bankruptcy filing, failed to have his employment approved by the bankruptcy court and

refused to return the advance of approximately $300,000 when ordered to do so. The statutory provisions referenced above were designed to protect against just such overreaching by an attorney in the bankruptcy court.

Within one year prior to the commencement of STN's bankruptcy case, STN paid to Chodos in excess of $290,000 in attorneys' fees and costs for representing STN in the State Lawsuit. While the State Lawsuit was pending, STN filed a voluntary petition under Chapter 11. Two days before filing its bankruptcy petition, STN delivered to Chodos an additional check in the amount of $283,498.38, which was paid one day after the petition was filed. The $283,498.38 was an *advance* for any *future* legal services necessary to prosecute the State Lawsuit. Chodos sought and took the advance because he erroneously thought that by doing so he could avoid having to file fee applications with the bankruptcy court.

Because STN had filed for bankruptcy, Chodos was required to have the bankruptcy court approve his representation of STN in the State Lawsuit. In aid of his application for that approval, Chodos told the bankruptcy court and STN that, if the bankruptcy court did not approve Chodos' postpetition employment, Chodos would return the $283,498.38 to STN.

The bankruptcy court did not approve Chodos' application because he refused to keep time records and his hourly rates were $750 to $1,000 per hour. However, despite STN's request and Chodos' promise to return the

$283,498.38 if his application were denied, Chodos refused to return the funds to STN.

STN then commenced an adversary proceeding against Chodos in the bankruptcy case to recover the $283,498.38 advance paid by STN to Chodos. Based on § 329 of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure Rule 2017, STN moved for an order requiring the return of excessive compensation, including the $283,498.38 paid to Chodos just two days before STN commenced its bankruptcy case. The bankruptcy court granted the motion and ordered Chodos to return the $283,498.38 to STN. The order was subsequently stayed pending appeal.

During the pendency of its bankruptcy case, STN settled its claims in the State Lawsuit, which enabled STN to pay in full the prepetition claims of all of its creditors and administrative expenses incurred during STN's bankruptcy case. As a result, the bankruptcy court entered an order authorizing voluntary dismissal of STN's bankruptcy case, while specifically retaining jurisdiction "with respect to any disputes which have arisen or may have arisen between the Debtor and the Creditors or other parties-in-interest with respect to the satisfaction of the respective claims, including, but not limited to, any and all fee applications as well as any pending litigation by the Debtor to recover monies allegedly due the Debtor." (Petition, A4-A7.)

Although irrelevant to the Petition, Chodos claims that STN has since gone out of business. (Petition, p. 7.) STN, however, still has a Board of Directors and the officers and directors are engaged in preserving the value

of its assets, prosecuting and defending suits by or against it, adjusting and winding up business and affairs and distributing its assets in accordance with its plan of liquidation. Thus, it has a substantial interest in recovering the funds owed to it by its former attorney.

Chodos also implies that the $283,498.38 was paid to him for services already rendered, and that STN's claim for refund of his advance is still in the "pleading stage" in the bankruptcy court and only involves application of state law. (Petition, pp. 5-6.) In fact, Chodos admitted in the bankruptcy court that this payment was for future, not past, legal services; the bankruptcy court already determined that the $283,498.38 in fees paid by STN on the eve of STN's bankruptcy filing were excessive and related to the bankruptcy, and the court ordered its return pursuant to § 329. Indeed, because Chodos did not oppose the § 329 motion, the bankruptcy court's determination that the $283,498.38 payment was excessive is not at issue. All that remains is for the bankruptcy court's order to return the fees to become final so that it can be enforced.[1]

Chodos has tried to use the dismissal to avoid the order requiring him to pay the $283,498.38. However, the

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[1] STN has other claims pending in the adversary proceeding for violation of provisions of the Bankruptcy Code, as well as state common law claims, which have been stayed pending the appeal of the § 329 order. Thus, even the remaining claims are not the garden variety state law claims Chodos has represented them to be. Indeed, the bankruptcy court is in the best position to adjudicate the claims pursuant to the Bankruptcy Code, as well as state law claims based on the same set of facts.

district court refused to vacate the § 329 order and dismiss the adversary proceeding for lack of jurisdiction, holding that the bankruptcy court's retention of jurisdiction was "entirely appropriate." (Petition, A8-A10.) Instead, the district court affirmed the § 329 order. (Petition, A8-A32.) The court of appeal then affirmed in an unpublished decision. (Petition, A24-A37.)

SUMMARY OF ARGUMENT

First, Chodos does not offer any reason why this Court should review this case under the guidelines of Supreme Court Rule 10. Chodos does not contend that there is (1) any conflict with a decision of another court of appeals or state court of last resort, (2) any basis for the exercise of this Court's supervisory power or (3) any important question of federal law. To the contrary, having failed to eliminate the bankruptcy judge on the grounds of bias and prejudice, and having failed to challenge the ability of the bankruptcy court to retain jurisdiction over the § 329 order on the grounds provided under settled law, Chodos asks this Court to throw out the discretion given to bankruptcy courts and announce an inflexible rule that is contrary to established law and policy.

Second, Chodos fails to address the basis for the court of appeals decision. Indeed, his arguments, which are raised for the first time with this Court, have little, if anything to do with this case.

Finally, Chodos' arguments are simply and clearly wrong and unwise. He would have this Court order that a bankruptcy court's "jurisdiction always terminates

when the bankrupt has returned to solvency." (Petition, p. 17.) Such a rule would not only be contrary to well settled law, but would violate strong federal policy in favor of allowing bankruptcy courts to closely monitor the fees paid to an attorney in contemplation of a bankruptcy case and retain jurisdiction to supervise the fees paid to debtor's counsel after the dismissal of a bankruptcy case.

REASONS FOR DENYING THE WRIT

I. CHODOS IMPROPERLY MAKES ARGUMENTS FOR THE FIRST TIME IN THIS COURT

Chodos argues, for the first time in this case, for an absolute rule that a bankruptcy court's jurisdiction over any matter related to the debtor's affairs must always terminate when the debtor has returned to solvency, to avoid "encroaching on the powers reserved to the states under the Tenth Amendment." (Petition, p. 11-12.) In the hundreds of pages of briefs he filed in support of his arguments in the three courts below, Chodos never argued that the U.S. Constitution mandated such a rule, which has become the cornerstone of his petition to this Court.[2] This, alone, is grounds for denying the petition.

[2] In the courts below, Chodos made a variety of arguments regarding why dismissal of the bankruptcy court's § 329 order was warranted, including the fact that STN had returned to solvency. However, Chodos never argued for an inflexible rule on the basis that anything less would be an encroachment on state powers. In addition, Chodos never argued for a mandatory rule that spells out when a bankruptcy court's jurisdiction

This Court has repeatedly held that it will exercise jurisdiction over federal claims not raised below only in "exceptional cases." *See Hoover v. Ronwin*, 466 U.S. 558, 104 S.Ct. 1989, 1998 (1984), *reh'g denied*, 467 U.S. 1268 (1984); *Heckler v. Campbell*, 461 U.S. 458, 103 S.Ct. 1952, 1958 n.12 (1983); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940); *Duignan v. United States*, 274 U.S. 195, 200 (1927).

Chodos' challenge to the bankruptcy court's jurisdiction is not an exceptional case. It is common for a bankruptcy court to exercise jurisdiction over matters after the dismissal of the bankruptcy. *See In re Franklin*, 802 F.2d 324, 326 (9th Cir. 1986) (after dismissal of a bankruptcy case, a bankruptcy court has subject matter jurisdiction to construe its own orders "if they are to be held capable of monitoring whether those orders are ultimately executed in the intended manner"). Therefore, the fact that STN's bankruptcy case was dismissed is not unusual or relevant. Furthermore, neither is it unusual or relevant that STN returned to solvency. Indeed, insolvency is not even a prerequisite to the commencement of a bankruptcy case. *See, e.g., In re Hulse*, 66 B.R. 681, 683 (Bankr. M.D. Fla., 1986) ("[i]t should be noted that neither insolvency nor inability of the Debtors to pay their debts is a prerequisite to seeking any form of relief under the Bankruptcy Code"); *In re Johns-Manville Corp.*, 36 B.R. 727, 732 (Bankr. S.D.N.Y. 1984) ("it should be noted that neither Section

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comes to an end or under what circumstances a bankruptcy court can retain jurisdiction.

109 nor any other provision relating to voluntary petitions by companies contains any insolvency requirement").

Thus, because insolvency is not even a prerequisite to the commencement of a bankruptcy case, and bankruptcy courts exercise jurisdiction as a matter of course after the dismissal of bankruptcies, a rule that jurisdiction must cease upon the dismissal of the bankruptcy case and the debtor's return to solvency makes no sense. However, proponents of such a rule should propose it to the bankruptcy court, the district court and in the court of appeals before seeking review in this Court. There is no reason for this Court to address Chodos' new theory without the benefit of any analysis of the question by any of the three courts below. For this reason, the petition should be denied.

II. THERE IS NO CONFLICT IN DECISIONS JUSTIFYING REVIEW

Chodos concedes that there is no conflict in decisions justifying his petition for writ of certiorari. (Petition, p. 11.) To the contrary, the courts of appeal agree that bankruptcy courts should have discretion to retain jurisdiction after the bankruptcy has been dismissed where such jurisdiction is supported by economy, fairness, convenience and comity. *See, e.g., In re Carraher*, 971 F.2d 327, 329 (9th Cir. 1992); *Matter of Querner*, 7 F.3d 1199, 1202 (5th Cir. 1993); *In re Morris*, 950 F.2d 1531, 1535 (11th Cir. 1992); *In re Smith*, 866 F.2d 576, 580 (3rd Cir. 1989); *see also Chapman v. Currie Motors, Inc.* 65 F.3d 78, 81 (7th Cir. 1995), *reh'g en banc denied*, 1996 U.S. App. LEXIS 549 (7th

Cir. Jan. 12, 1996). There is no conflict in the circuits justifying review.

III. THERE IS NO IMPORTANT FEDERAL QUESTION TO REVIEW

Chodos also does not articulate any important federal question to review. Nor does he articulate why it is important for the Court to take away a bankruptcy court's discretion and to establish an inflexible rule regarding when jurisdiction should be retained.

Instead, relying on *Celotex Corp. v. Edwards*, ___ U.S. ___, 115 S.Ct. 1493, 1499 (1995), Chodos makes general references to a danger of overreaching by the bankruptcy court's "limitless" jurisdiction. (Petition, p. 10.) While it is true that bankruptcy courts should not have unlimited jurisdiction, in this context they do not. To the contrary, their jurisdiction is limited in a variety of ways by statute and by common law. For example, § 349 provides that, except for good cause, certain orders of the bankruptcy court will be automatically vacated upon dismissal of the bankruptcy. (Petition, A40.) In addition, bankruptcy courts are limited by consideration of the four factors discussed above in determining whether to retain jurisdiction after a dismissal.

Chodos also suggests that without a mandatory rule, bankruptcy courts will infringe on states' rights. (Petition, p. 11-12.)[3] This concern is baseless. Bankruptcy

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[3] In support of this argument Chodos cites to a number of opinions by the Court regarding states' rights. *See Younger v.*

courts' discretion in exercising jurisdiction is subject to several limitations, which would prevent any such interference. As a practical matter, bankruptcy courts will not go out of their way to retain jurisdiction (and increase their workload) unless it is necessary, efficient or fair to do so. Indeed, as noted by the court of appeal, the situation here is similar to the district court's exercise of jurisdiction over pendent state claims upon dismissal of all federal claims. (Petition, A30.) *See* 28 U.S.C. § 1367; *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-26, 86 S.Ct. 1130 (1966) (pendent jurisdiction based on considerations of comity, economy, fairness and convenience); *Harrell v. 20th Century Ins. Co.*, 934 F.2d 203, 205 (9th Cir. 1991) (same). In that context, experience shows that district courts are not clamoring to retain jurisdiction and to improperly usurp the proper role of the state courts.

Ultimately, Chodos fails to justify a rule that always ousts bankruptcy courts of jurisdiction after dismissal where the debtor returns to solvency. In fact, by proposing such a rule, Chodos ignores the important reasons – economy, comity, fairness and convenience – why the bankruptcy court should be able to retain jurisdiction over some claims, whether or not the debtor is solvent or the bankruptcy is dismissed.[4]

Harris, 401 U.S. 37, 44 (1971); *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); and *Erie R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938). For the reasons discussed below, the concern addressed by these cases is inapplicable here.

[4] In fact, Chodos' current position is inconsistent with his position in the court of appeal, where he argued that judicial economy, convenience, fairness and comity weighed against retention of jurisdiction. Having lost that argument, Chodos

In considering comity, bankruptcy courts are able to determine whether the claims require interpretation of state law. When an adversary proceeding contains claims under the Bankruptcy Code, it makes sense for the bankruptcy court to maintain jurisdiction. If the bankruptcy court cannot retain jurisdiction after dismissal, the complainant may be left with no remedy at all. *See, e.g., In re Wood,* 210 U.S. 246, 256 (1908) (regarding § 60d of the Bankruptcy Act of 1898, "the bankruptcy act confers no jurisdiction upon a state court to entertain an application of the trustee, or of a creditor to reduce the provision made to counsel; that jurisdiction is given alone to the district court of the United States in administering the property").

"Judicial economy looks to preserve energies already invested by the parties and the court in the proceedings." *In re Stardust Inn, Inc.,* 70 B.R. 888, 891 (Bankr. E.D. Pa. 1987). A mandatory rule that the bankruptcy court loses all jurisdiction after dismissal of the bankruptcy and solvency of the debtor, would result in duplication of efforts where an adversary proceeding has already progressed through phases of litigation in the bankruptcy court and the bankruptcy judge has become familiar with the case. *See, e.g., In re Pocklington,* 21 B.R. 199, 202 (Bankr. S.D. Cal. 1982) (after dismissal of bankruptcy case, bankruptcy court retained jurisdiction over adversary proceeding where court "had already heard testimony and received documentary evidence").

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now asks the Court to simply throw out these factors and establish a new rule.

Finally, bankruptcy courts should be allowed to consider whether retention of jurisdiction would be fair and convenient for the parties. For example, where, as here, the opposing party voluntarily submitted to the jurisdiction of the bankruptcy court, retention of jurisdiction over claims affecting that party would be fair. Moreover, if going forward with the adversary proceeding in the bankruptcy court is more convenient than dismissing it so that it can be litigated in state court, it would be senseless to dismiss the adversary proceeding simply because the bankruptcy was dismissed.[5]

IV. THE PETITION FAILS TO IDENTIFY A REASON WHY THIS COURT SHOULD IGNORE IMPORTANT FEDERAL POLICY

The petition also should be denied because the rule proposed by Chodos directly conflicts with strong federal policy to protect creditors of the estate and vulnerable debtors against overreaching by attorneys representing troubled companies. The Court, in dealing with the statutory precursor to § 329 of the Bankruptcy Code (§ 60d of

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[5] An inflexible rule requiring dismissal of an adversary proceeding when the bankruptcy is dismissed would lend itself to manipulation by the parties. *See, e.g., Chapman v. Currie Motors, Inc.* 65 F.3d 78, 81 (7th Cir. 1995) (recognizing the danger created if a debtor in an adversary proceeding is able to bounce the proceeding out of federal court by procuring the dismissal of the underlying bankruptcy proceeding, for example by defaulting on a Chapter 13 payment scheme). Thus, the parties and the courts are better served by the existing process that allows consideration of a variety of factors to determine whether jurisdiction is appropriate.

the Bankruptcy Act of 1898), explained the rationale for closely monitoring the fees paid to an attorney "in contemplation of a bankruptcy case." *See In re Wood*, 210 U.S. 246, 251 (1908) (recognizing that Section 60d addressed the temptation of a failing debtor to deal too liberally with his property in employing counsel to protect him in view of financial reverses and probable failure, the Court upheld a bankruptcy court's jurisdiction to require repayment of fees paid prepetition to debtor's counsel) (emphasis added). *See also Conrad, Rubin & Lesser v. Pender*, 289 U.S. 472, 477 (1933) ("[t]he manifest purpose of [§ 60d] is . . . to provide a restraint upon opportunities to make an unreasonable disposition of property through arrangement for excessive payments for prospective legal services").

Following the enactment of the Bankruptcy Code, courts have acknowledged that the same concerns articulated by the Court in *Wood* and *Conrad, Rubin & Lesser* constitute the foundation for § 329 of the Bankruptcy Code. *See In re Mills*, 170 B.R. 404, 408 (Bankr. D. Ariz. 1994) ("Compensation of the debtor's attorney is [ ] subject to close scrutiny in order to 'preserve the creditor protection provisions of the bankruptcy laws' and because of 'serious potential for overreaching by the debtor's attorney' in the bankruptcy context."). *See also In re Walters*, 868 F.2d 665 (4th Cir. 1989) ("The provisions [of § 329 and Federal Rule of Bankruptcy Procedure 2017] are meant to protect the creditors *'and the debtor* against overreaching' by attorneys.") (emphasis in original); *In re Dixon*, 143 B.R. 671, 676 (Bankr. N.D. Tex. 1992) ("In enacting § 329, Congress has reaffirmed the statement of policy set out in *Conrad, Rubin & Lesser v. Pender, supra.*").

Thus, § 329 was enacted to protect against the very abuse that occurred with respect to Chodos' dealings with STN. The State Lawsuit was one of STN's major assets. In order to keep its state court counsel from abandoning STN upon the filing of its bankruptcy case, STN was maneuvered into making a large advance to Chodos on questionable terms.[6] Pursuant to the policies behind § 329 and Rule 2017, the bankruptcy court ordered that the funds be returned to STN.

The goal of § 329 and Rule 2017, to prevent overreaching by the debtor's attorney, would be undermined if the dismissal of a bankruptcy case or the solvency of the debtor eliminated the jurisdiction of the bankruptcy court to review prepetition fee payments to the debtor's attorney. Indeed, many courts have held that a bankruptcy court's jurisdiction to supervise the fees paid to debtor's counsel continues after the dismissal of a bankruptcy case. *See, e.g., Post v. Ewing*, 119 B.R. 566, 568-69 (S.D. Ohio 1989) (holding that, irrespective of dismissal of case, bankruptcy court had jurisdiction to enter order requiring attorney to refund fees to debtors, after attorney had failed to follow court's prior instructions to do so); *In re Fox*, 140 B.R. 761, 762 (Bankr. D.S.D. 1992) (holding that court had jurisdiction over final fee application filed by debtor's counsel, irrespective of dismissal of debtor's chapter 12 case).

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[6] Rule 2017 of the Federal Rules of Bankruptcy Procedure was also designed "to protect the creditors of the estate and the debtor against overreaching by an officer of the court who is in a peculiarly advantageous position to impose on both the creditors and his client." Advisory Committee Note to Rule 2017 (citations omitted).

The rationale courts give for post-dismissal jurisdiction to supervise fees paid to debtor's counsel is that the bankruptcy "court's duty of oversight of fee matters embraces a broad supervisory power over any fees charged in contemplation of, or in connection with, a bankruptcy case by both attorneys and lay persons, as provided in the Bankruptcy Code and Rules." *See e.g., In re Fricker*, 131 B.R. 932, 938 (Bankr. E.D. Pa. 1991). It is irrelevant whether creditors or the bankruptcy court have an interest in the fees paid by the debtor to an attorney. *See In re Tennessee Valley Center for Minority Economic Development, Inc.*, 99 B.R. 845 (Bankr. W.D. Tenn. 1989) (after the voluntary dismissal of a chapter 11 case, the bankruptcy court retained jurisdiction and ordered debtor's attorney to restore any unearned portion of a $5,000 retainer paid prepetition). *See also In re Samford*, 102 B.R. 724, 726-27 (Bankr. E.D. Mo. 1989), *aff'd*, 125 B.R. 230 (E.D. Mo. 1989) (holding that dismissal of bankruptcy case did not eliminate court's duty to supervise fees paid to debtor's state court counsel); *In re Lowe*, 97 B.R. 547, 548-49 (Bankr. W.D. Mo. 1987) (holding that court required to determine reasonableness of attorneys' fees after dismissal of bankruptcy case).

The rule proposed by Chodos would seriously hinder the bankruptcy court's ability to review fees paid by the debtor in cases similar to those described above and would undermine the strong policy in favor of such review.

CONCLUSION

This case presents no conflict in decisions or any important federal question for this Court. Moreover, the proposed rule conflicts with well-established federal policy which protects debtors and their creditors from overreaching by attorneys before and after bankruptcy filings. The Petition should therefore be denied.

Respectfully submitted,

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